State	Submitting Entity	Commenter Name
Arizona	DEQ	Trevor Baggiore (Director, Water Quality Division)
Arizona	DEQ	Trevor Baggiore (Director, Water Quality Division)
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Discussion Topic	Issue	Comment Heading
Enforcement & Compliance	Endangered Species Act	ESA "Take" Prohibition Liability Is Not Accounted for under State 404 Assumption
Enforcement & Compliance	Endangered Species Act	ESA "Take" Prohibition Liability Is Not Accounted for under State 404 Assumption
Enforcement & Compliance	Endangered Species Act	ESA "Take" Prohibition Liability Is Not Accounted for under State 404 Assumption
Partial Assumption	Application Process	Partial Assumption of 404

Comment Sub-Title

State CWA § 404 ESA-related Requirements

Permittees (and Possibly State) Liable under ESA without Section 7 or Section 10 Protection

Options to Resolve ESA Liability Issues under CWA § 404

Partial Assumption of 404

Comment

To assume the CWA § 404 program, a state must demonstrate that its permit program will assure compliance with, among other things, the CWA § 404(b)(1) guidelines. The CWA § 404(b)(1) guidelines prohibit a state from issuing a permit if the discharge will jeopardize the continued existence of a listed threatened or endangered species or would likely adversely modify a critical habitat of a listed threatened or endangered While a state's CWA § 404 requirements may be satisfied by conducting a jeopardy determination, under CWA § 404, permittees often engage in activities that pose risks to threatened or endangered species listed under the Endangered Species Act (ESA) and their habitats. This in tum exposes permittees (and potentially the state) to liability under ESA. Therefore, before engaging in 404 activities, permittees often obtain incidental take conditions to avoid, minimize, or mitigate risk of "take." Incidental take permits or conditions are issued with approval by U.S. Fish and Wildlife Service under one of two sections of ESA, either Section 7 or Section 10. **3** In either case, only the federal government may issue incidental take provisions that shield actors from ESA liability. The Corps, as a federal agency, issues incidental take conditions in its CWA § 404 permits through formal consultation processes authorized under ESA Section 7, but a state may not because there is no federal nexus under ESA.

Therefore, if a state issues a CWA § 404 permit, no matter how substantively protective, a permittee would At least two options may alleviate liability issues associated with a state 404 program. First, ADEQ recommends exploring the possibility to allow states to issue legally and environmentally protective incidental take permit conditions under ESA Section 7. This may require modifications to laws that extend beyond CWA § 404, but it could be an important step to ensuring efficient environmental protection. ADEQ recommends that EPA work with U.S. Fish and Wildlife at the highest levels to determine ways to address this critical issue. Second, states assuming the 404 program should have the option to negotiate an "off-ramp" process to Under the current state implementation rules, EPA may not approve partial assumption of the CWA § 404 program.**5** This rule was based on EPA's interpretation of the statute in context of the addition of a specific authorization for partial program approval under CWA § 402 in 1987, where no such provision was added for purposes of CWA § 404.**6** However, the CWA § 404 statute is silent on the issue and does not specifically preclude partial assumption. Therefore, ADEQ encourages EPA to revisit this interpretation. Given the circumstances of assuming a federal program, it may be reasonable that a state only assumes part of a program.

As mentioned above, given the apparent lack of federal nexus to allow a state to undergo Section 7 consultation, ADEQ recommends that EPA establish in rule the option for states to establish a process, in negotiation with the Corps and EPA, whereby the Corps would retain jurisdiction over permits for projects that have a likely adverse effect on threatened or endangered species.

ADEQ also recommends that EPA clarify in its rules whether a state must establish its own compensatory mitigation program in order to assume the CWA § 404 program. For example, an already established, Corps-

Citations

1 See 40 C.F.R. § 230.10(b)(3).
2 See generally Nat'l Ass'n of Home Builders v. Defs. of Wildlife, 551 U.S. 644 (2007).

3 See generally 16 U.S.C. §§ 1536 (ESA § 7), 1538 (ESA § 9), and 1539 (ESA § 10).
4 See generally Babbitt v. Sweet Home Chapter ofCmtys.for a Great Or., 515 U.S. 687, 704 (1995); Aransas Project v. Shaw, 756 F.3d 801 (5th Cir. 2014).

5 See 40 C.F.R. § 233.l(b).
6 See NFRM, 53 Fed. Reg. 20,764 (Jun. 6, 1988).

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Partial Assumption	Roles & Responsibilities	Establish Balance of EPA-State Relationship in Rule
Other	Funding	Funding and Resources
Other	Funding	Funding and Resources

Establish Balance of EPA-State Relationship in Rule

Limited Program Development Funding and No Dedicated Program Operation Funding

Human Capital Timing

There is a concern that EPA will have a disproportionate and potentially unreasonable level of control over state 404 permit actions. This is in part because the rules lack the specificity necessary to ensure a balanced relationship.

For comparison, the statutory CWA § 404(j) permit objection process is similar in substance to that of the CWA § 402 NPDES program (33 U.S.C. § 1342(d)), but the implementing regulations are not. Rather, the bases for objection are much more specifically delineated in NPDES regulations than they are in CWA § 404 regulations.**7**

For example, NPDES regulations state that the EPA may object to the issuance of a permit if the permit "fails to apply, or to ensure compliance with, any applicable requirement of this part."**8** Whereas, 404 regulations state that EPA may object to a permit based on EPA's "determination that the proposed permit is....outside the requirements of the Act ."**9** While permits must be issued in compliance with the Act, EPA's regulations should delineate what this means for purposes of objection. It is specifically enumerated in the NPDES regulations what is expected and what the grounds are for objection. Therefore, ADEQ recommends that EPA more specifically delineate the grounds for any permit objection in 40 C.F.R. § 233.50, similar to the NPDES regulations, to ensure a clear and streamlined objection process that is directly related to the permitting action under CWA § 404.

States need additional resources to develop and operate the CWA § 404 program. While some funding may be available to develop a CWA § 404 program through EPA Wetland Program Development Grants, these are competitive grants with limited application timeframes and limited allocation.

Also, there is no dedicated funding for operation of the CWA § 404 program. While some CWA § 106 funds may be used to support the CWA § 404 program, such funds often already support critical functions of state water quality protection programs under the CWA. Very little is left to fund an entire permitting program.

(a) Operation Funding Solution - Reallocate Funds
ADEQ recommends that proportional funding from the Corps' current budget should be allocated to states with approved CWA § 404 programs.
Should a state assume a CWA § 404 program, a proportional amount of funds should be allocated from the Corps to the State in order to support proper function of a state program. Therefore, any allocation should be based on the respective workloads of each agency to support the CWA § 404 program as a whole.

(b) Compensatory Mitigation Funding
Should a state develop a compensatory mitigation program, funding should be available not just for operation of the program, but also for technical improvements. Compensatory mitigation program is a sub-program to CWA § 404 permitting and requires significant resources above administrative costs. For example, identifying functions and values and assigning mitigation credits is a process that needs significant technical
It is unclear in the rules at what point staff must be hired and available to operate the CWA § 404 program, or whether, after demonstration of a state's fiscal capability and program plan, there could be a transition period between EPA-approval of the program and operation in order to fully staff the program.

7 See 40 C.F.R. § 123.44(c).
8 40 C.F.R. § 123.44(c)(l) (emphasis added).
9 40 C.F.R. § 233.S0(e) (emphasis added).
10 40 C.F.R. § 233.5l(b)(6).
11 See 40 C.F.R. § 233.52.

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Other	Funding	Funding and Resources
Enforcement & Compliance	404(b)(1)	404(b)(1)
Partial Assumption	Application Process	Public Notice and Hearings
Partial Assumption	Application Process	Public Notice and Hearings
Partial Assumption	Application Process	Clarifications in 40 C.F.R. Part 233
Partial Assumption	Application Process	Clarifications in 40 C.F.R. Part 234

Other Transitional Clarifications

n/a

Electronic Submittal and Notice of Information and Hearings

Timing of Notice and Comment

State-Issued General Permits

A.G. Certification - Takings Analysis

The transition of authority to the Corps should be further addressed and clarified in rule. For example, it should be clarified which agency has the post-state assumption responsibility to oversee mitigation site
The 404(b)(1) Guidelines, while rules, are written as guidelines. This creates a lack of clarity and consistency across the country, between district engineers in the same branch, and between interpretations of different agencies (e.g. EPA v. Corps). The word "should" appears in the guidelines 81 times.**12** This includes how the requirements for alternatives, significant degradation factual determinations, and compensatory mitigation are to be implemented.
The lack of clarity found in Part 230 may cause rejection of initial applications and lead to debate between all parties (Corps v. EPA v. State v. Permittee v. NGOs). ADEQ recommends that EPA review the 404(b)(1) rules
ADEQ recommends reviewing the rules in 40 C.F.R. Part 233 for areas that should account for electronic submittal and notice of information. **13** In today's digital world, notice in newspapers should not be required and electronic submittals of information and permits should be allowed. EPA should also consider allowing for
Further, timing of required notice and comment periods should align with other assumable programs, such as NPDES. Formal notice and comment is more effective once there is a draft of a permit available. Therefore, while simple notice of an application may be reasonable at the application stage, notice and comment should take place at the draft permit stage. A simple notice at the application stage will allow interested persons the opportunity to be aware of any potential impacts and engage with the agency about any potential concerns,
The CWA § 404 statute and implementing regulations contemplate that a state may develop a general permit program for CWA § 404. State general permits, which may be very similar to nationwide permits, would still be state-issued general permits pursuant to a state's own general permit program authorized under CWA § 404. However, there are currently some confusing statements in Part 233 regarding state general permits.

For example, EPA regulations state that the "decision not to assume existing Corps general permits does not constitute a partial program" and "the discharges previously authorized by general permit will be regulated by State individual permits."**14** This statement seems to imply
that if a state's general permit does not exactly equal Corps general permits, the state's permit qualifies only as an individual permit.

Therefore, EPA should remove language in 40 C.F.R. Part 233, including 40 C.F.R. § 233.21, that implies that state general permits must match exactly Corps nationwide permits if the state issues a general permit that
Pursuant to CWA § 404(g), with the program submittal and description, a state "shall submit a statement from the attorney general.....that the laws of such State....provide adequate authority to carry out the described program." EPA regulations further mandate that the statement "contain a legal analysis of the effect of State law regarding the prohibition on taking private property without just compensation on the successful implementation of the State' s program." 40 C.F.R. § 233.12(a). EPA should clarify in rule or provide additional

12 See generally 40 C.F.R. Part 230

13 E.g. 40 C.F.R. § 233.32(c).

14 40 C.F.R. § 233.l(b).

Minnesota	Association of Minnesota Counties	Scott Schulte (President, Association of Minnesota Counties)
	Minnesota County Engineers Association	Lon Aune (President, Minnesota County Engineers Association)

Minnesota	Association of Minnesota Counties	Scott Schulte (President, Association of Minnesota Counties)
	Minnesota County Engineers Association	Lon Aune (President, Minnesota County Engineers Association)

Clarifying Assumed and Retained Waters and Wetlands	WOTUS - Section 10	Assumable Waters
Partial Assumption	Application Process	Permit Application Procedures

n/a

n/a

With the support of Minnesota Counties, the state invested a significant amount of staff time and funding to estimate and map Corps-retained and State-assumable waters based on the previous interpretation of retained waters provided by the Corps' St. Paul District. That analysis indicated that the vast majority of waters and wetlands in Minnesota would be retained by the Corps if the State were to pursue assumption. In addition, a case-by-case review of waters, particularly wetlands, would often be required just to determine if a water was retained or not, thereby eliminating many of the procedural efficiencies to be gained by assumption. For states like Minnesota, the amount of assumable waters, including the process used to identify them, has been one of the most significant barriers to assumption. We have reviewed the Assumable Waters Subcommittee's final report and recommendations. We agree with the Assumable Waters Subcommittee majority recommendations to clarify which waters the Corps would retain (and thus which a state could assume) and believe they are a reasonable interpretation of the law that is supported by legal history and congressional intent. We urge EPA to adopt the majority recommendations.

We understand the need for including specific procedural requirements in the current regulations, which originated in 1988 when fewer comprehensive state regulatory programs existed. However, thirty years later, states like Minnesota have well-established regulatory programs with a track record of successful implementation. To the extent allowable by statute, we urge EPA to eliminate many of the specific process requirements in the current rule (e.g. noticing, publication in newspapers, review periods, etc.) and instead simply focus on the desired outcome (e.g. "states shall ensure transparency by adopting procedures to provide for the public notice of applications…").

The 404 assumption regulations should allow EPA to recognize pre-established and effective state programs, and allow such states to use their existing, effective processes. Overall, the new rules should focus on ensuring that states and tribes have 1) standards for protection that are at least equivalent to federal standards, and 2) the capability to implement them. Procedural issues should largely be left for the states to develop and implement (or incorporate into existing procedures for states with existing programs). Such an approach would be consistent with our understanding of the intent of 404 assumption–to ensure protection of our nation's waters while utilizing state programs and procedures that can be tailored to the circumstances

Minnesota	Association of Minnesota Counties	Scott Schulte (President, Association of Minnesota Counties)
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Enforcement & Compliance	Roles & Responsibilities	Establishment and administration of state regulatory programs.
Calculating Economic Costs and Benefits of the Rule	Funding	Costs and benefits of 404 Assumption.

n/a

n/a

Minnesota has well-established and comprehensive water and wetland regulatory programs, administered by three State agencies. Specific to wetlands, the State Board of Water and Soil Resources (BWSR) is responsible for administration of the Minnesota Wetland Conservation Act (WCA), including establishment of the WCA rules (MN Rule Chapter 8420), development of application forms and procedures, and administration of the State wetland bank. However, the WCA rules are implemented primarily by local government units (LGUs), consisting of political subdivisions of the State (counties, Soil and Water Conservation Districts, and cities), with BWSR oversight. That oversight includes BWSR application review and comment through the State Technical Evaluation Panel (similar to the Federal Interagency Review Team but with additional authority), the ability to declare a moratorium for LGU non- implementation, the ability to appeal all LGU decisions, and serving as the ultimate decision-making authority by hearing and deciding on appeals (under State law, a decision is not final until a decision has been made on an appeal or the appeal window has closed).

This model of shared State-local responsibility has been extremely important to the successful implementation of WCA. It allows for the implementation of State law commensurate with local land-use authorities, including building permits, septic systems, zoning, and other local authorities. It results in several hundred LGU staff trained in wetland science and policy "on the ground," reviewing the activities of landowners. Not only is this model successful in assuring awareness of activities affecting wetlands and providing for effective avoidance and minimization of resource impacts early in the process, but it is also much more responsive and efficient for landowners.

The entire WCA is structured around this model of shared State-local responsibility. If this model were not allowed under 404 assumption, it would result in tremendous upheaval of a statewide network of local water resource expertise, primarily County staff, and would be a significant step backward from the goal of protecting our resources in a manner that is efficient and user-friendly to the public. Consequently, significant changes to Minnesota's existing, demonstrably effective state-local regulatory structure would substantially diminish the benefits, feasibility, and appeal of 404 assumption in our state.

Chapter 3.7 of the "Minnesota Federal Clean Water Act Section 404 Permit Program Feasibility Study" (January 2017) discussed the estimated costs and savings of 404 assumption that would accrue to affected units of government. That analysis concluded that there would be:

- Increased costs to the state for implementation of an assumed program, primarily for staffing (the actual amount of increase for Minnesota could vary significantly depending on the implementation scenario and the extent to which our current implementation model is viable under 404 assumption);
- Savings to the Corps in an amount equal to the value of work that would become the responsibility of the state; and
- Savings to local governments as project sponsors due to faster permitting timeframes and reduced redundancy by not having to prepare separate state and federal permit applications and devote staff time to separate permit processes.

As an example of savings to local government project sponsors, the report cited an analysis conducted by the St. Louis County (Minnesota) Public Works Department in 2013 that reviewed the permitting process for five selected transportation projects in the county. They concluded that project delays associated with the Section

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	Minnesota County Engineers Association	Lon Aune (President, Minnesota County Engineers Association)
Minnesota	Association of Minnesota Counties	Scott Schulte (President, Association of Minnesota Counties)
	Minnesota County Engineers Association	Lon Aune (President, Minnesota County Engineers Association)

Enforcement & Compliance	Mitigation	Applicability of the Federal Mitigation Rule.
Clarifying Assumed and Retained Waters and Wetlands	Application Process	MOA with Corps.
Enforcement & Compliance	Roles & Responsibilities	EPA Oversight.

n/a

n/a

n/a

We recommend that EPA consider clarifying the applicability of the Federal Mitigation Rule (40 CFR Part 230) for a state-assumed program, most importantly with respect to the role of the Corps in the review and approval of mitigation banks and in-lieu fee projects. We view the establishment and oversight of mitigation sites as an inseparable part of a permitting program that should be the responsibility of the state if it can demonstrate, to EPA's satisfaction, that the program as a whole provides an equivalent level of protection for aquatic resources. In a state like Minnesota with a significant number of wetland banks, a scenario where the state assumes permitting approval but not the responsibility for review and approval of wetland banks would complicate decision making processes and retain a system of redundant state and federal mitigation bank reviews.

Separating the decision authority for the impacts from the decision authority for establishing the corresponding mitigation would be illogical and contrary to the goals of compensatory mitigation. In addition, under an assumption scenario, a dual decision authority (by the Corps and state) on the same project could create complications as the state's decision would already convey Section 404 authority.

For state-sponsored ILF programs, we acknowledge that federal oversight is required to satisfy the requirements in the Federal Mitigation Rule, but we encourage EPA to clarify that the oversight would be provided by the EPA (as opposed to the Corps in the absence of an approved program).
Assuming the new regulations clarify the assumable waters issue, the Memorandum of Agreement (MOA) between the state and the Corps becomes less essential to the state program approval process. EPA could consider moving some of the elements of the state-Corps MOA to the state-EPA MOA, and/or separating the state-Corps MOA from the program approval process. At a minimum, EPA should clearly define Corps-retained waters consistent with the majority recommendation of the Assumable Waters Subcommittee, and establish a dispute-resolution process to resolve disagreements between the state and Corps.

An agreement between the state and the Corps would also be the most logical place to address projects that cross the state-Corps administrative boundary for wetlands, the use of wetland banking or In-Lieu Fee credits across agency lines, and other general coordination issues. The agreement should include a map, available as

State legislatures can be subject to dramatic shifts in political philosophy. State autonomy and the ability of voters to affect state government is extremely important. However, implementation of a state-assumed Section 404 program is a state's choice and effectively represents a partnership with the federal government. Accordingly, section 404 assumption should not be used a vehicle for states to diminish federal protections for the nation's water resources. We support effective EPA oversight of state-assumed programs, particularly in regards to state statute changes that would be inconsistent with the Federal Clean Water Act. EPA's oversight should focus on ensuring adequate standards for protection, leaving procedural issues to the states.

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	Minnesota County Engineers Association	Lon Aune (President, Minnesota County Engineers Association)
Multi-state	Association of State Wetland Managers	Marla Stelk, (Executive Director, ASWM)
	Association of Clean Water Administrators	Julia Anastasio (Executive Director & General Counsel, ACWA)
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	Association of Clean Water Administrators	Julia Anastasio (Executive Director & General Counsel, ACWA)
Georgia	Environmental Protection Division	Jennifer Welte (Program Manager)

Enforcement & Compliance	Endangered Species Act; NHPA Section 106	Endangered Species Act (ESA) and Section 106 of the National Historic Preservation Act (Section 106) compliance coordination.
Partial Assumption	General	n/a
Clarifying Assumed and Retained Waters and Wetlands	WOTUS - Section 10	n/a
Partial Assumption	Roles & Responsibilities	
Clarifying Assumed and Retained Waters and Wetlands	WOTUS - Section 10	n/a

n/a

n/a

n/a

n/a

The process, and basis for, the current ESA coordination requirements in 40 CFR 233.50 are unclear. We look forward to working with EPA to clarify how the process of reviewing projects to ensure compliance with the ESA and Section 106 would occur under 404 assumption. It will be critical to agree on processes that retain the streamlining benefits of that are the goal of 404 assumption.

Our research has shown that historically while at least twenty-six states have explored assumption over time, states have commonly rejected pursuing assumption of the Section 404 program due primarily to: 1) a lack of resources to effectively implement a state regulatory program that is fully consistent with Section 404 program requirements (including a lack of federal funding to assist in achieving federal CWA goals, either during a transition phase or permanently), 2) uncertainty over the extent of jurisdictional waters that can be assumed, and 3) a need to significantly modify existing state regulatory programs to ensure federal consistency.

We encourage EPA to consider these issues during the rulemaking process, as well as the following: 1) additional uncertainty about assumable waters in response to ongoing Water of the United States proposed rulemaking; 2) limited state and tribal experience with assumption for other states and tribes to build on; 3) Current efforts to change the definition of Waters of the United States (WOTUS) are intended to reduce the extent of federal jurisdiction, and by extension, would reduce the extent of waters that would be assumable by states/tribes under Section 404 assumption. Such a reduction could affect the feasibility of state Section 404 assumption. As federal jurisdiction and the extent of assumable waters contracts, the benefits of assumption in terms of overall regulatory efficiency may not be enough to outweigh the state/tribal costs of developing, administering and maintaining a program that is fully consistent with Section 404 program
We have found peer-to-peer sharing and working examples from other state and tribal models to be a valuable tool for helping states and tribes develop new programs and capacity. However, while two states (New Jersey and Michigan) have assumed the Section 404 program, their programs alone likely cannot adequately serve as models for other states to follow. Rulemaking should be completed in conjunction with the development of technical assistance for states and tribes on all phases of the assumption process.

Additionally, many states and tribes have expressed interest in partial assumption. We support exploring partial assumption, particularly in the context of enabling states and tribes to phase in an assumption
With respect to assumable waters the agencies have the benefit of input from the NACEPT Assumable Waters Sub-Committee recommendations and input provided during the December 6 meeting discussions offered support for those recommendations as a way to provide some clarity to the public and a good starting point for state discussions with EPA regarding assumable waters. Like many other states, Georgia does not currently have the benefit of a mapping of our state's Rivers and Harbors Act Section 10 waters, and EPA

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Georgia	Environmental Protection Division	Jennifer Welte (Program Manager)
Georgia	Environmental Protection Division	Jennifer Welte (Program Manager)
Indiana	Department of Environmental Management	Marrtha Clark Metller (Assitant Commissioner, Office of Water Quality)
Indiana	Department of Environmental Management	Marrtha Clark Metller (Assitant Commissioner, Office of Water Quality)
Maryland	Department of the Environment	Lee Currey Ben Grumbles
Maryland	Department of the Environment	Lee Currey Ben Grumbles

Partial Assumption	Mitigation	n/a
Calculating Economic Costs and Benefits of the Rule	Funding	n/a
Calculating Economic Costs and Benefits of the Rule	Funding	n/a
Partial Assumption	Application Process	n/a
Partial Assumption	Application Process	n/a
General	Application Process	n/a
General	Application Process	n/a

n/a

n/a

n/a

n/a

n/a

n/a

n/a

n/a

Georgia supports the inclusion of partial assumption in any future 404(g) rulemaking. During the December 6 meeting, other commenters noted the need for flexibility and the opportunity that partial assumption will provide for states to take a phased approach to 404 assumption, learning from initial steps that can help them build experience and expand their programs going forward. Commenters also noted that states may not want to assume responsibility for compensatory mitigation programs. Those practical realities support the inclusion When calculating the economic costs and benefits of any future rulemaking, it is very important that EPA take into consideration that not all states will be equal in the various economic considerations that will factor into their 404 assumption decisions. This was an important point brought out during the December 6 meeting discussions. While EPA noted that they will consider information from states who currently administer 404 programs (Michigan and New Jersey) or those who have considered and analyzed 404 assumption (Minnesota, Virginia and Alaska were noted as examples), it may be problematic to use that information to inform a nationwide generalization of costs to the states. This particular topic may be one that warrants further input from the states, including a work group of state agencies who could provide more discussion and Finally, we also recommend that while formulating this rulemaking, EPA should consider whether any potential cost savings that could be achieved by the federal government with respect to a state's 404 assumption program could be shifted towards allocation to the states for program implementation. It is our understanding that no additional federal funding is being considered to support 404 program assumption and states would instead consider a shifting of other federal funding sources (i.e., 106 funds) to support such
The Indiana Department of Environmental Management (IDEM) values the opportunity to provide the U.S. Environmental Protection Agency (U.S. EPA) with comments on U.S. EPA's plans for the first comprehensive revision to the existing section 404(g) regulations since 1988. IDEM understands that U.S. EPA's intent is to modernize these regulations and foster a greater interest by the authorized tribes and states in assuming 404 permitting authority. IDEM is responsible for the daily implementation of the Clean Water Act (CWA) water
Over the past year, IDEM has worked with U.S. EPA and the U.S. Army Corps of Engineers (USACE) to understand what is needed for Indiana's application to assume 404 permitting as well as what will be needed to successfully implement a 404 permitting equivalent program once assumption is accomplished. Based on what IDEM has learned to date, IDEM suggests U.S. EPA consider, when evaluating modernizations to the 404(g) regulations, affording states the opportunity to phase in or partially assume 404 permitting authority. As states will need time to gather resources to implement a 404 permitting equivalent program, phasing the assumption of program elements could support more efficient and effective implementation and a smoother
MDE has carefully reviewed the existing 404 (g) regulations as well as the statutory provisions of the CWA pertaining to 404 assumption with an eye toward making specific recommendations for regulatory changes that comport with the statutory construct. A general observation is that the existing 404(g) regulations contain a number of "administrative" provisions which are not mandated by the actual language of Section 404 of the CWA, and thus, USEPA has great latitude to reconsider these provisions in order to facilitate State assumption. MDE strongly encourages USEPA to undertake a careful review of the existing 404 (g) rules
For example, Subpart B, Program Approval, requires that any State that seeks approval of a 404 Program submit four items that a State has complete control over: (1) Governor's letter; (2) Program Description; (3) Attorney General's Statement; and (4) Copies of all applicable State statutes and regulations. However, it also requires that a State submit a Memorandum of Agreement (MOA) between the State and the USEPA Regional Administrator (RA) and a MOA between the State and the Secretary of the Army acting through the Corps of Engineers (ACOE). A State submission is not considered complete under the current regulations without all of

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Maryland	Department of the Environment	Lee Currey Ben Grumbles
New England	New England Interstate Water Pollution Control Commission	Susan J. Sullivan (Executive Director)

Clarifying Assumed and Retained Waters and Wetlands	Roles & Responsibilities	n/a
Partial Assumption	Funding	n/a

n/a

n/a

Although I believe that it is "good government" for USEPA and the ACOE to develop MOAs with a State to address implementation issues associated with State assumption, I do not see a requirement in the CWA Section 404 that MOAs be part of the submission, and, the truth is that a State has no control over the timing of the completion of such MOAs. I am concerned that if an ACOE District Office is less than enthusiastic about State assumption, the District Office could delay indefinitely the signing of a MOA. MDE recommends that USEPA remove from the list of the elements of a program submission the requirement for signed MOAs with the RA and ACOE. Rather, MDE recommends that USEPA include the need for these MOAs, with regulatory deadlines and consequences if deadlines are not met, under a new section covering implementation.

A second example, Subpart B, Program Description, requires that a complete Program Description provided by the State include "a description of the waters of the United States within a State over which the State assumes jurisdiction under the approved Program; a description of the waters of the United States within a State over which the Secretary retains jurisdiction subsequent to Program approval; and a comparison of the State and Federal definitions of wetlands." The section includes a "Note" stating that "States should obtain The lack of a list from the ACOE or a description provided by the ACOE of the waters of the United States within a State over which the Secretary retains jurisdiction subsequent to Program approval can preclude the State from submitting its application because an argument can be made that the State's Program Description (which is required) is incomplete. An incomplete Program Description means that the State Program Submission is incomplete and thus the 120-day statutory clock for an USEPA decision does not start. A State has no control over the timing of the ACOE providing its list of non-assumable waters or its description of non-assumable waters and thus, the ACOE through inaction can delay indefinitely the State's submission.

Accordingly, MDE recommends that USEPA revise 233.11 (h) as follows:

(H) A statement affirming that the State is assuming jurisdiction over waters of the United States within the State other than those waters which are presently used or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark or mean higher high water mark on the west coast, including wetlands adjacent thereto OR if the Secretary has identified those waters of the U.S. within the State over which the Corps retains authority at the time of submission, this list shall be included in the State's submission as part of the Program description.

The New England Interstate Water Pollution Control Commission (NEIWPCC) is providing these comments related the Agency's pre-proposal comment request and as a follow-up to the December 6, 2018 meeting. The proposal aims to update and modernize the assumption of dredge and fill permitting authority under Section 404(g) of the Clean Water Act (CWA). Established by an Act of Congress in 194 7, NEIWPCC is a not-for-profit interstate agency that utilizes a variety of strategies to meet the water-related needs of our member states (the six New England states and New York). We represent the primary state agencies in our region responsible for administering programs under the CWA. For the purposes of this letter Connecticut , Maine , New Hampshire , New York, Rhode Island, and Vermont are providing these comments.

Overall, the states listed above are interested in continued cooperative federalism and the co-regulatory design of the CWA. We appreciate the open communication on the modernization of CWA §404(g). As

New England	New England Interstate Water Pollution Control Commission	Susan J. Sullivan (Executive Director)
New England	New England Interstate Water Pollution Control Commission	Susan J. Sullivan (Executive Director)
Wisconsin	Department of Natural Resources	Ann Kipper
District of Columbia	Department of Energy & Environment	Tommy Wells (Director)

Enforcement & Compliance	Endangered Species Act	n/a
General	Application Process	n/a
General	Application Process	n/a
Clarifying Assumed and Retained Waters and Wetlands	WOTUS - Section 10	n/a

n/a

n/a

n/a

n/a

As we understand it, the Endangered Species Act (ESA) would apply to the §404 permitting process even at the state level per 40 C.F.R. §230.I 0(b) and these protections are also referenced in state level regulations. It is important for EPA to clarify or provide guidance on the applicability of the ESA for states that seek to Several states in the NEIWPCC region appreciate the backstop function that EPA and the US Army Corps of Engineers play in the §404 permitting process. The cooperative partnership between the states and federal agencies is paramount to the implementation of the §404 permitting program.

Thank you for inviting Wisconsin to attend your December 2018 Clean Water Act section 404(g) (404g) webinar and to comment on the information provided. The Wisconsin Department of Natural Resources (department) is currently considering whether to pursue 404 assumption. A Wetland Study Council was convened by our former Governor to research and develop recommendations on program elements that would be necessary for the department to administer the wetland program if the state should assume the federal authority to implement the wetland program in Wisconsin. The first council meeting will likely be held in February 2019. To aid our efforts with the Wetland Study Council, the department applied for and received a federal grant from the EPA to conduct a 404 assumption feasibility study. Providing transparency and instruction to states about assumable waters and other assumption conditions would help states complete DOEE agrees with the National Advisory Council for Environmental Policy and Technology (NACEPT) Final Report of the Assumable Waters Subcommittee (Final Report) recommendation for EPA to amend 40 CFR Part 233 and provide guidance on procedures to be followed when a state or tribe proposes to assume the §404 Program. The regulations and guidance should clarify the waters for which a state may assume permitting and those for which guidance should clarify for which a state may assume permitting and those for which permitting authority would be retained by the U.S. Army Corps of Engineers (USACE). DOEE supports the use of Waters Alternative B: Primary Dependence on the Rivers and Harbors Act (RHA) Section 10 List of Navigable Waters, as described in the NACEPT Final Report. This alternative uses existing USACE lists of RHA Section 10 waters to define USACE-retained waters. Waters included on the Section 10 lists based solely on historical navigational use may be assumed by a state or tribe, and thus would be deleted from the list of USACE-retained waters. When a state or tribe seeks assumption, the state or tribe, the USACE, and the EPA waters, and resolve any waters that do not clearly meet the criteria for USACE-retained waters. The agreed-upon list of retained waters should be included in a memorandum of agreement (MOA) between the state and USACE.

With regard to retained wetlands, DOEE supports the establishment of a customized administrative boundary in accordance with negotiations between a state or tribe and the USACE during the development of the required MOA with the USACE. DOEE believes this approach will be more suitable to meet local natural resource needs and circumstances, in light of differing wetland characteristics among different eco regions. In negotiating the boundary the state and USACE should consider existing state programs, regional differences,

District of Columbia	Department of Energy & Environment	Tommy Wells (Director)
District of Columbia	Department of Energy & Environment	Tommy Wells (Director)
District of Columbia	Department of Energy & Environment	Tommy Wells (Director)
New Jersey	Department of Environmental Protection	Jill Aspinwall (Land Use Management)
New Jersey	Department of Environmental Protection	Jill Aspinwall (Land Use Management)

Partial Assumption	Application Process	n/a
Enforcement & Compliance	Endangered Species Act; NHPA Section 106	n/a
Partial Assumption	Funding	n/a
General	Application Process	n/a
Partial Assumption	Application Process	n/a

n/a

n/a

n/a

n/a

n/a

States and tribes have requested the ability to assume part of the CWA §404 Program, which is currently not an option. During the State Engagement Meeting, EPA presented multiple partial assumption options to consider, including assumption by activity, discharge impact threshold, geographic distribution, and whether or not more than on state or tribal entity should be able to assume different portions of the 404 program.

DOEE does not support the option to assume partial CWA §404 authority by activity. Defining activities regulated by the assumed program with sufficient clarity would be difficult and could create the risk of permitting gaps and less resource protection. Similarly, DOEE does not support allowing more than one state or tribal entity to take responsibility for different portions of the §404 Program. These options would not provide clarity regarding permitting authority in the field, nor would they eliminate unnecessary duplicative permitting.
Based on discussions during the State Engagement Meeting, if a state assumes the CWA §404 Program, then consultation with U.S. Fish & Wildlife Service (USFWS) under Endangered Species Act (ESA) §7 (16 U.S.C. § 1536) is not required. ESA §7 requires federal agencies, including the USACE, to consult with USFWS to ensure that actions they take, fund, or authorize do not jeopardize the existence of any listed species.

To ensure that CWA § 404 assumption will result in an equivalent or greater level of resource protection, DOEE urges the EPA to revise 40 CFR Part 233 to require states and tribes to consult with the USFWS when any action the state or tribe carries out, funds, or authorizes may affect a listed endangered or threatened State or tribal assumption of CWA §404 authority could reduce the overlap and duplication of state, tribal, and federal permitting programs. Assumption allows a state or tribe to incorporate local requirements into permit conditions and to integrate review of applications for discharge of dredged or fill material with other applicable regulatory requirements. Given the potential for significant streamlining of the permitting process, the public may support assumption and be willing to accept the costs to a state or tribal government and associated higher permit fees. However, states or tribes that do not have enough permit application submitted annual to fund the program with fees may not be able to pursue CWA §404 assumption because no Thank you for the opportunity to provide comment on the proposed changes to Section 404 (g). As only one of two States that assumed the 404 Permitting Program from the United States Environmental Protection Agency (USEPA), New Jersey supports the opportunity and ability of any other State that wishes to assume the 404 Permitting Program from the USEPA.

New Jersey also supports the recommendations of the Association of State Wetland Managers (ASWM) and the Association of Clean Water Administrators (ACWA) set forth in their January 28, 2018 letter. (The ASWM According to the January 28, 2018 letter, research conducted by the ASWM and ACWA shows that while at least 26 states have explored assumption of the 404 program, states have commonly rejected pursuing assumption due primarily to: 1) a lack of resources to effectively implement a state regulatory program that is fully consistent with Section 404 program requirements (including a lack of federal funding to assist in achieving federal CWA goals, either during a transition phase or permanently); 2) uncertainty over the extent

New Jersey	Department of Environmental Protection	Jill Aspinwall (Land Use Management)
Missouri	Department of Natural Resources	Carol S. Comer
Missouri	Department of Natural Resources	Carol S. Comer
Missouri	Department of Natural Resources	Carol S. Comer

Enforcement & Compliance	WOTUS - Section 10	n/a
Clarifying Assumed and Retained Waters and Wetlands	WOTUS - Section 10	n/a
Partial Assumption	Application Process	n/a
Partial Assumption	Funding	n/a

n/a

n/a

n/a

n/a

In addition, the USEPA is encouraged to consider the following during the rulemaking process:
1) additional uncertainty about assumable waters in response to ongoing Water of the United States proposed rulemaking;
2) limited state and tribal experience with assumption for other states and tribes to build on;
3) the possibility of allowing partial assumption; and
4) the impact of assumption on consistency with federal statutes such as the Endangered Species Act,
The Department agrees with the majority recommendation from the May 2017 Assumable Waters Subcommittee Report, under which the USACE would retain administrative authority over all navigable waters under Section 10 of the Rivers and Harbors Act (RHA) of 1899 and adjacent wetlands landward to an administrative boundary agreed upon by the state or tribe and the USACE. The Department believes a default 300-foot national administrative boundary is a good starting point, provided that it could be expanded or contracted on a segment-by-segment basis. Flexibility would be key where diverse topography and hydrology results in varying floodplain widths. High gradient Ozark streams may require a smaller administrative boundary, where a low gradient, sinuous prairie stream may require a larger boundary. A default based on regional difference, such as the regional wetland delineation manuals, may be a solution to standardizing the width of the boundary nationwide.

Each USACE district should reevaluate the existing Section 10 list, identify any new waters under RHA, and distribute that information to the states and tribes with any changes posted through a public participation process with a comment period and potentially public hearing before being finalized. Any future changes to an effective Memorandum of Agreement (MOA) between the USACE and assumption authority would then need to follow an established edit process to reflect changes, including transition logistics.

Current technology provides tools to easily identify and characterize water resources. The Department utilizes a GIS-based water classification system for lakes and streams in the form of a hydrographic map data set incorporated into regulation that provides water quality protection coupled with certainty and predictability. A state's ability to select partial assumption depends on how USEPA defines which waters it can assume. Currently a state would be required to assume all Section 404 jurisdictional waters, which could make assumption fiscally or administratively unachievable for most states. We support partial assumption because it would allow states with limited resources to begin implementing a program based on their current abilities. If partial assumption were allowable, the agencies would need to clearly define their regulatory roles so applicants can easily identify which entity to contact.

In Missouri, statutory and regulatory changes would be needed to provide the Department explicit authority to implement a Section 404 permitting program. The Department currently has an established Compliance and Enforcement Section to address violations related to CWA Section 402 and other water programs implemented by the state, which includes penalties and other legal actions.

The Department does not have a separate water or land use permitting program that is similar to the Section 404 permitting program; therefore, costs would be new and substantial for Missouri to assume the Section 404 program, in part or whole. The USACE estimated that its current implementation of the Section 404 program in Missouri employs approximately 30 full time employees across the five districts for a total cost of $4.4 million annually. The CWA Section 106 funds, which the Department receives under the Performance

Missouri	Department of Natural Resources	Carol S. Comer
Missouri	Department of Natural Resources	Carol S. Comer
Missouri	Department of Natural Resources	Carol S. Comer

Partial Assumption	Application Process	n/a

n/a

If the Department assumes Section 404 permitting authority, Section 401 water quality certifications (WQC) could be combined with the Section 404 process (but not for other federal authorizations), which may result in up to 60 days' worth of time saved to applicants. Some claim there is duplication for the review of Section 401 WQC, but we often see inconsistencies among the five USACE regulatory branches operating in Missouri as well as errors in the application materials submitted by applicants. State assumption of Section 404 would streamline the process because all permitting staff would be in one office under one leadership. Section 404

Tribal Affiliation	Submitting Entity	Commenter
Bad River Band of Lake Superior Tribe of Chippewa Indians	n/a	Michael Wiggins, Jr. (Chairman) Naomi Tillison (Natural Resources Director)
Bad River Band of Lake Superior Tribe of Chippewa Indians	n/a	Michael Wiggins, Jr. (Chairman) Naomi Tillison (Natural Resources Director)
Bad River Band of Lake Superior Tribe of Chippewa Indians	n/a	Michael Wiggins, Jr. (Chairman) Naomi Tillison (Natural Resources Director)
Bad River Band of Lake Superior Tribe of Chippewa Indians	n/a	Michael Wiggins, Jr. (Chairman) Naomi Tillison (Natural Resources Director)
Bad River Band of Lake Superior Tribe of Chippewa Indians	n/a	Michael Wiggins, Jr. (Chairman) Naomi Tillison (Natural Resources Director)
Keweenaw Bay Indian Community	Natural Resources Department	Stephanie Kozich

Discussion Topic	Issue	Comment Heading
Other	Rulemaking Process	n/a
Enforcement & Compliance	Mitigation	Differences in Federal and State Wetland Laws
Enforcement & Compliance	Mitigation	Implementation of Federal Wetland Law and Compensatory Mitigation
Enforcement & Compliance	Mitigation	Other Federal Environmental Laws
Enforcement & Compliance	Endangered Species Act	Other Federal Environmental Laws
Clarifying Assumed and Retained Waters and Wetlands	Application Process	State and Tribal Assumption of Section 404g of the Clean Water Act

Comment Sub-Title

n/a

n/a

n/a

n/a

n/a

n/a

Comment

Because of the lack of a draft rule on revisions to Clean Water Act Section 404(g), we believe that it is premature to seek consultation and that meaningful consultation and coordination on a government-to-government basis cannot occur without a draft or in the time period form October 22-December 21, 2018. There was a "Tribes-only Information Webinar" on "404(g) rulemaking" on November 20, 2018 and November For a state to assume permit review authorized by Section 404 of the Clean Water Act, the State's law must be as stringent as the Clean Water Act and the implementing regulations per 40 C.F.R Sec. 233.1(d). In the event that state regulatory program underlying the program authorized by Section 404 is less stringent than federal Section 404 of the Clean Water Act requires permit applications to first avoid, and then minimize, impacts to aquatic resources. This process, at the federal level, includes a third step that generally requires applicants to provide compensatory mitigation for unavoidable impacts to aquatic resources.

Mitigation is primarily based upon an assessment of aquatic resource function service loss versus functional As a federal action, the issuance of a Section 404 Clean Water Act permit is typically subject to other federal environmental laws. For example, large or complex projects require preparation of an Environmental Impact Statement. Preparation of these documents is more efficient when state or tribal government participates as a cooperation agency. (See 40 C.F.R. Sec 1505.5). Should state law either legally or practically preclude a cooperating agency, it would necessarily force federal review.

In addition, field reviews for large complex projects provide key information to better assess important Last, Section 404 Clean Water Act permits routinely include consultation with the U.S. Fish and Wildlife Service regarding impacts to listed species under Section 7 of the Endangered Species Act (ESA). These Section 7 consultations are subject to judicial review under the ESA in federal district court.

If a state were to assume the Section 404 Program it is unclear how it would protect endangered species, including formal consultation, a biological opinion, and dispute resolution. It is also unclear how the state On behalf of the Keweenaw Bay Indian Community (KB IC), a federally recognized tribal nation with more than 3,000 tribal members, we submit these comments regarding Tribal Assumption of Section 404g of the Clean Water Act.

KBIC is one of many tribes that have centuries of cultural and spiritual connections to the land, waters and fish in the streams. Under the 1842 Treaty of LaPointe, our Community reserved rights to hunt, fish, trap, and gather on traditional lands ceded to the United States. Our community continues to harvest berries, medicinal plants, water from springs, fish from streams, and wildlife in the 1842 Ceded Territories.

KBIC appreciates the opportunity to comment on Tribal Assumption of 404g. Our community has a goal to provide for the protection and preservation of the environment. In order for KBIC to carry out the necessary tasks to protect and preserve our environment, we rely on clear guidance the Environmental Protection Agency (EPA) provides to States and Tribes. At this time, we cannot assume this authority.
The KBIC Natural Resources Department requested guidance on what lands are included in assuming this authority. The KBIC L' Anse Reservation boundaries consists of over 59,000 acres and it is unclear at this time if the extent of this authority will include these lands and/or land bordering the reservation.

Citations

Morongo Band of Mission Indians	Environmental Protection Department, Tribal Water Program	Kimberly Miller (Environmental Specialist II)
Morongo Band of Mission Indians	Environmental Protection Department, Tribal Water Program	Kimberly Miller (Environmental Specialist II)
Morongo Band of Mission Indians	Environmental Protection Department, Tribal Water Program	Kimberly Miller (Environmental Specialist II)
n/a	National Congress of American Indians	Darren Modzelewski (NCAI Policy Counsel) Derrick Beetso (NCAI General Counsel)
n/a	National Congress of American Indians	Darren Modzelewski (NCAI Policy Counsel) Derrick Beetso (NCAI General Counsel)

Partial Assumption	Funding	n/a
Enforcement & Compliance	Roles & Responsibilities WOTUS - Section 10	n/a
Partial Assumption	General	n/a
Clarifying Assumed and Retained Waters and Wetlands	WOTUS - Section 10	Clarifying the Scope of Assumable Waters
Clarifying Assumed and Retained Waters and Wetlands	WOTUS - Section 10	Clarifying the Scope of Assumable Waters

n/a

n/a

n/a

Determining Assumable Waters (Other than Wetlands)

Conclusion - Determining Assumable Waters

While greater clarity on assumable waters (rather than those retained by the Army Corps of Engineers) is generally beneficial for regulatory program clarity, it is not the primary reason that has discouraged us from seeking out assumption of the 404 program. Tribal water programs generally operate with limited staff and funding. The assumption of a new regulatory program would stretch these resources. While the information webinar indicated potential funding sources for program development, the only reliable funding for program In addition to funding and staffing concerns, there are other issues that discourage our assumption of the program. The 404 program is applicable to waters of the United States. Our location in the arid southwest and the proposed definition of the waters of the United States would significantly limit the extent to which the program would be applicable on the reservation. It may be a better use of our resources to provide tribal water resource protections to the current extent possible rather than assuming the 404 permit program. There is also the tenuous nature of the tribe itself being the primary entity that would require permitting While these comments may not reflect the situation and viewpoint of all tribes, they characterize the reason why tribal assumption of the 404 permitting program is not something we would be interested in pursuing at this time, regardless of the extent of this regulatory revision. Identifying assumable waters may be the first step in encouraging the assumption of the 404 permitting program, but the potential lack of clarity is not the only deterrent that exists. The capacity and resources of our department, the physical setting of the
As to the first question, the Subcommittee presented three possibilities for determining which waters could be "assumable" by a state or tribe under § 404(g). The first possibility is that the existing regulatory framework remain unaltered. The second option, and the one endorsed by the Subcommittee, would use those waters listed in Section 10 of the Rivers and Harbors Act as the basis for determining which waters would be retained by the U.S. Army Corps of Engineers (USACE). Two key features of this option is the exclusion of waters listed in Section 10 based solely on their status as historically navigable and in the case of state assumption, tribal waters would be excluded from state permitting authority. The final option proposed that the USACE retain authority of Section 10 waters and those waters determined by the USACE to be "traditional navigable waters" pursuant to 33 C.F.R. § 328.3(a)(1). This final option was endorsed by USACE.

Section 10 of the Rivers and Harbors Act enumerates a range of waters, including but not limited to, navigable rivers or other waters, harbors, canals, breakwater, or channel of a navigable water. 33 U.S.C. § 403. Navigable waters are further defined by the implementing regulations for the CWA as those waters "that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce." 33 C.F.R. § 329.4.

Limiting retained waters to this definition with the addition of historically navigable waters would significantly expand the scope of waters over which states would have permitting authority and simultaneously place a currently uncalculated amount of adjacent wetlands under state permitting authority. The same conclusion

Given the potential removal of an unknown quantity of wetlands from USACE oversight, and possibly the protections from other federal statutes (see below) as well as the lack of clarity these new proposals create, NCAI recommends EPA take no action on the current system and instead work to develop wetlands, rivers, and associated tribal resources dependent on these ecosystems.

n/a	National Congress of American Indians	Darren Modzelewski (NCAI Policy Counsel) Derrick Beetso (NCAI General Counsel)
n/a	National Congress of American Indians	Darren Modzelewski (NCAI Policy Counsel) Derrick Beetso (NCAI General Counsel)
n/a	National Congress of American Indians	Darren Modzelewski (NCAI Policy Counsel) Derrick Beetso (NCAI General Counsel)

Clarifying Assumed and Retained Waters and Wetlands	WOTUS - Section 10	Clarifying the Scope of Assumable Waters
Clarifying Assumed and Retained Waters and Wetlands	WOTUS - Section 10	Clarifying the Scope of Assumable Waters
Partial Assumption	Roles & Responsibilities	Partial Assumption

Determining Adjacent Wetlands

Conclusion - Determining Adjacent Wetlands

n/a

EPA requests comments on how "adjacent wetlands" should be determined. EPA presents several options. These include, the (USACE) retaining permitting authority over all wetlands whether or not they "touch" navigable waters, the USACE retaining permitting authority over only those wetlands that "touch" navigable waters, and an option that presents different possibilities for demarcating administrative boundaries – including co-management of bisected wetlands by USACE and states or tribes.

The Subcommittee's majority recommendation is that the USACE retain permitting authority over all wetlands landward of a navigable water to an administrative boundary whether or not the wetlands touch a navigable water. The Subcommittee suggests a national administrative default inland boundary of 300 feet. This option also proposes a mechanism for states and tribes to negotiate alternative inland administrative boundaries based on regional or geographic differences and needs.

The Subcommittee claims this alternative offers both certainty and flexibility. NCAI agrees that this option creates a mechanism to respond to local or regional needs but it seems this approach only creates certainty to the extent that a line is drawn across a geographic space. It is unclear how establishing administrative boundaries across potentially inter-connected or inter-related hydrological systems creates certainty and meets the goals of the CWA. Given the complexities of water systems, the majority recommendation builds in the potential for conflicts between co- managers of the same wetlands and uncertainty as to the environmental health of those wetlands.

The Subcommittees proposal of drawing an administrative line across an environmental resource as opposed to geographic or hydrological boundaries determined by the "significant nexus" test found at 40 C.F.R. §

In light of the proposed rulemaking regarding the definition of "waters of the United States," the close synergistic relationship between the definition of "waters of the United States" and the § 404(g) definition of "adjacent wetlands," NCAI recommends no change until there is a more settled definition of "waters of the United States" and understanding of how "adjacent wetlands" fits into that definition.

EPA also requests comments regarding the possibility for tribes to partially assume § 404(g) permitting authority. NCAI supports the ability of tribes to carry out the continued protection, preservation, and promotion of the environmental and cultural health of their current and traditional homelands.

NCAI encourages EPA to look to the tribal partial assumption programs under the CWA at 42 U.S.C.

n/a	National Congress of American Indians	Darren Modzelewski (NCAI Policy Counsel) Derrick Beetso (NCAI General Counsel)
n/a	National Congress of American Indians	Darren Modzelewski (NCAI Policy Counsel) Derrick Beetso (NCAI General Counsel)

Calculating Economic Costs and Benefits of the Rule	Funding	n/a
Enforcement & Compliance	n/a	Other Issues - Agency Review Under Federal Law

n/a

Endangered Species Act

Over 40 tribes have received treatment as a state (TAS) status for purposes of the CWA. Tribes are familiar with the process of regulating water resources and often exercise their inherent authorities to institute their own permitting and licensing processes. Further, tribal TAS status has been upheld by reviewing courts as proper delegations of authority to tribal governments. See, City of Albuquerque v. Browner, 97 F.3d 415 (10th Cir. 1996) (addressing tribal attempts to regulate the activities of non- Indians upstream from tribal lands.); Montana v. EPA, 137 F.3d 1135, 1140 (9th Cir. 1998) (upheld EPA's grant of TAS status, acknowledging tribes' inherent authority to regulate non-Indian activities on fee lands within the reservation.); and Wisconsin v. EPA, 266 F.3d 741 (7th Cir. 2001). Also the CWA at §401 acknowledges that tribes have a right to be notified of permits issued outside their jurisdiction that "may effect" water quality and have a right to object to a permit or license if it "will effect" water quality. See also, 43 CRF 11.62(b-c).

However, the exercise of this authority is costly and requires considerable resources. Many states are able to exercise this authority because states are able to develop strong tax bases to support such costs. In contrast, tribes are subject to dual taxation realities that make it difficult to develop a strong tax base. For this reason, EPA should consider ways to help tribes offset costs to exercise increased regulatory authority. This might include supporting future legislation that would increase funding or perhaps provide tribes an opportunity to contract with EPA to carry out certain duties and responsibilities on tribal lands, and over tribal resources, in a manner consistent with tribal priorities.

The ESA was enacted to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved and provide a program for the conservation of such endangered species and threatened species." 15 U.S.C. § 1551(b). Pursuant to the ESA, if an action is authorized, funded, or carried out by a federal agency that may affect an endangered or threatened species, the agency is required to consult with the Secretary of the Interior or the Secretary of Commerce as appropriate. 15 U.S.C. § 1551(a). Consultation acts as a stop-gap to ensure an agency action is "not likely to jeopardize the continued existence of any endangered or threatened species." 15 U.S.C. § 1551(b). Consultation safeguards the purpose of the ESA, that "the conservation of endangered species and threatened species listed pursuant to §4 of this Act" is carried out. 15 U.S.C. § 1551(a)(1).

The Secretaries of Interior and Commerce recognized importance of consultation to tribes in the context of

n/a	National Congress of American Indians	Darren Modzelewski (NCAI Policy Counsel) Derrick Beetso (NCAI General Counsel)
n/a	National Congress of American Indians	Darren Modzelewski (NCAI Policy Counsel) Derrick Beetso (NCAI General Counsel)

Enforcement & Compliance	n/a	Other Issues - Agency Review Under Federal Law
Enforcement & Compliance	n/a	Other Issues - Agency Review Under Federal Law

National Historic Preservation
Act (Part I)

National Historic Preservation
Act (Part II)

The National Historic Preservation Act (NHPA), which was enacted in 1966 and has been amended several times since then, proclaims the policy of the Federal Government "to foster conditions under which our modern society and our historic property can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations." 54 U.S.C. § 300101(1). This policy is to be implemented "in cooperation with other nations and in partnership with States, local governments, Indian tribes, Native Hawaiian organizations, and private organizations and individuals." 54 U.S.C. § 300101.

A key component of the cooperative directive of the NHPA is what is commonly referred to as "Section 106 consultation." 54 U.S.C. § 306108. Section 106 imposes a two-part procedural requirement for "any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking" and "any Federal department or independent agency having authority to license any undertaking" to: (1) "take into account the effect of the undertaking on any historic property"; and (2) "afford the [Advisory] Council [on Historic Preservation] a reasonable opportunity to comment." 54 U.S.C. § 306108. This mandate is implemented through regulations issued by the Advisory Council.36 C.F.R. Part 800.

The term "historic property" is statutorily defied as "any prehistoric or historic district, site, building, structure, or object included on, or eligible for inclusion on, the National Register, including artifacts, records, and Many places that hold tribal religious and cultural importance are "traditional cultural properties," a kind of historic property described in a guidance document first issued in 1990 by the National Park Service, the agency charged with administering many aspects of the NHPA, other than the Section 106 process. National Register Bulletin 38, Guidelines for Evaluating and Documenting Traditional Cultural Properties. Many traditional cultural properties are relatively undisturbed places in the environment. In many tribal traditions, particular features such as springs, streams, and wetlands are regarded as sacred. Such places may suffer severe adverse effects from the discharge of dredged or fill material authorized pursuant to section 404 of the CWA.

From a tribal perspective, traditional cultural properties are important not so much because of their historic significance but, rather, because they are sacred. The law in the United States, however, does not afford much protection to tribal sacred places because of their sacredness. While there is a federal statute, the American Indian Religious Freedom Act (AIRFA) (42 U.S.C. § 1996), that proclaims a national policy of protecting the freedom of Native American people to exercise their traditional religions, including access to sites, AIRFA does not provide for judicially enforceable rights. See COHEN'S HANDBOOK OF FEDERAL INDIAN LAW §

n/a	National Congress of American Indians	Darren Modzelewski (NCAI Policy Counsel) Derrick Beetso (NCAI General Counsel)
n/a	National Congress of American Indians	Darren Modzelewski (NCAI Policy Counsel) Derrick Beetso (NCAI General Counsel)
n/a	National Congress of American Indians	Darren Modzelewski (NCAI Policy Counsel) Derrick Beetso (NCAI General Counsel)

Enforcement & Compliance	n/a	Other Issues - Agency Review Under Federal Law
Enforcement & Compliance	n/a	Other Issues - Agency Review Under Federal Law
Enforcement & Compliance	n/a	Other Issues - Agency Review Under Federal Law

National Historic Preservation Act (Part III)

National Environmental Policy Act

Magnus-Stevenson Act

In light of this background we call your attention to the term "undertaking," which is statutorily defined as:

A project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including—

(1) Those carried out by or on behalf of the Federal agency;
(2) Those carried out with Federal financial assistance;
(3) Those requiring a Federal permit, license, or approval; and
(4) Those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.

54 U.S.C. § 300320. Clause (4) in this statutory definition would appear to include permits to discharge dredged or fill material pursuant to a state or tribal program approved by EPA pursuant to subsection 404(g) of the CWA.

However, the U.S. Court of Appeals for the District of Columbia Circuit has ruled that undertakings that fit within clause (4) of the definition are not subject to the requirements of Section 106. National Mining Ass'n v. Fowler, 324 F.3d 752, 758-60 (D.C. Cir. 2003) (holding that section 106 limits the authority of the ACHP, in promulgating regulations, to undertakings that are federal, federally funded, or federally licensed).

Congress enacted the National Environmental Policy Act (NEPA) (1969) to "declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man." 42 U.S.C. § 4321.

To meet the goals of NEPA, the statute requires that federal agencies prepare Environmental Impact Statements (EIS) for "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). In developing an EIS, an agency must "study, develop, and describe appropriate alternatives to recommended course of action in any such proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(2)(E). The agency must also "rigorously explore and objectively evaluate all reasonable alternatives" and state how those alternatives meet or do not meet the requirements of the Act. 40 C.F.R.§ 1502(14)(a)-(c). An important part of the NEPA process is Passed in 1976, the Magnuson-Stevenson Act provides guidance on the management of marine fisheries operating within U.S. federal waters. This act works to prevent overfishing, increase long- term social and economic benefits of commercial fishing, conserve essential fish habitat, and ensure sustainable and safe seafood supply.

Like the other statutes described above, this Act requires consultation with the managing Secretary, here the

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n/a	National Tribal Water Council	Ken Norton (Chairman)

Enforcement & Compliance	n/a	Other Issues - Agency Review Under Federal Law
General	Funding	n/a

Conclusion- Other Issues

n/a

Collectively, the duties outlined in these and other statutes are essential for the protection, preservation, and economic development of and within tribal home lands. At their core, these statutes help guarantee the survival of certain environmental cornerstones which bolster tangible and intangible social, cultural, and economic undertakings that are themselves, at their core, actions of inherent tribal sovereignty, self-governance, and cultural continuance and development.

A key component of each of the statutes described above is consultation. In each case, the agency must consider the effects of the proposed action upon a particular resource – environmental, historic, or species. The consultation that takes place between agencies because of these statutes is an important intra-governmental function. But consultation between the federal government and one, many, or all of the 573 recognized tribal governments is part of the unique inter government-to- government relationship that tribal nations have had with western nations since before the founding of the United States, and that process continues today.

The delegation of § 404(g) permitting authority to states raises a serious question for tribal governments. That question is: will states that assume § 404(g) permitting authority be required to meet the review, analysis, and consultation standards that would otherwise be required for the same or similar actions if those activities were permitted by a federal agency?

As noted above, the United States Court of Appeals for the District of Columbia addressed this question in National Mining Ass'n v. Fowler, 324 F.3d 752 (D.C. Cir. 2003). There, the court considered the permissibility of the application of NHPA section 106 regulations to state and local agencies that permitted and licensed activities pursuant to a delegation or approval by a federal agency. Fowler, 324 F.3d at 754. Following Sheridan Kalorama Historical Ass'n v. Christopher, 49 F.3d 750 (D.C. Cir. 1995), the court held section 106 only applied to federally funded or licensed undertakings, not undertakings subject to state or local regulation administered pursuant to delegation or approval by a federal agency. Id. at 760).
The NTWC embraces Congress' delegation to tribes to develop and implement CWA programs for their reservations. CWA § 518(e), 33 U.S.C. § 1377(e); 81 Fed. Reg. 30183 (2016) (EPA Revised Interpretation of Clean Water Act Tribal Provision). There is no doubt that tribes, the aboriginal managers of their waters, are the ones most familiar with their aquatic resources, issues and needs. EPA's support for tribal assumption of the CWA § 404 dredge and fill permit program addresses one aspect of this congressional delegation and is welcomed by NTWC.

However, although many tribes have the desire to take on this program, most tribes do not have the resources to do so. The need for resources is a major issue that must be addressed in order for tribes to take

2 U.S. CONST., Art. I, § 8, Cl. 3.
3 See Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 202-03 (1999).

n/a	National Tribal Water Council	Ken Norton (Chairman)

n/a	National Tribal Water Council	Ken Norton (Chairman)

General	Funding	Tribes' Need for Resources to Develop and Run a CWA § 404 Program
Partial Assumption	Application Process	Tribal Concerns with State Assumption of the CWA § 404 Program

n/a

n/a

A tribally run CWA § 404 program can reduce delays and save money for permit applicants. It can allow the tribe to streamline the process, reduce unnecessary paperwork and, by providing opportunities for early input and discussion, avoid potential conflicts between tribes, states and the federal government regarding permit decisions. More importantly it puts the tribe in charge of protecting its own valued aquatic ecosystems as well as the traditional services that those systems provide. Tribes also having the most knowledge about their own water resources, are better able than the federal government to foresee potential adverse effects from a proposed dredge and fill project and to propose mitigation measures. The current permit process does not afford tribes adequate review and does not provide compensation adequate for loss or for mitigation efforts. It also often does nothing more than identify concerns with a proposed permit, without actually resolving them. For these reasons, if the need for resources were not a consideration, many tribes would be interested in developing their own CWA § 404 programs.

However, resources are a major consideration: CWA § 404 programs require substantial resources to develop and implement, in terms of both the staff required and the dollars needed to develop and administer an extensive and complex permit program. Indeed, this may be the primary reason why only two states have assumed responsibility for the program to date. The resource burden is even greater on tribes than on states, since tribes in general lack a tax base and have significantly fewer industries within their jurisdictions that would be available to share some of the costs, for example, through the assessment of permit fees. Presumably EPA is aware of the cost and effort that its staff expends in an oversight role of an assumed program. It is unfortunate that EPA does not seem to recognize the need to fund tribes to take over this permitting program. It is summarily inadequate to suggest that the competitive wetlands program development grants or CWA § 106 funding are a viable means to fund such a program. Wetland program development grants could certainly be used to start a permitting program, but not to sustain it, and CWA § 106 grants are intended to fund tribal water quality monitoring programs. For tribes to begin down this arduous process requires a significant commitment on their part, one which they cannot responsibly take on without having at least some certainty in long-term funding streams.

1.States do not have the same trust responsibility as the federal government to consider tribal interests.

If states take over the CWA § 404 program from EPA and the Army Corp of Engineers (ACE), ideally states would interact with tribes regarding impacts from state permits on downstream tribal waters, the way EPA and ACE should do. States are not subject to the same trust responsibility to tribes as the federal government, however, and may not accord the same weight to tribal concerns as the federal government would.
As EPA knows, the federal government owes a trust responsibility to tribes that requires the federal government to recognize and protect tribal interests. Tribal rights to consultation stem from this responsibility. Tribes also have a unique government-to-government relationship with the federal government. Although, more often than not, tribes would prefer managing their own affairs, including with regard to natural resources, when tribes lack the capacity to do so it is the federal government's responsibility to protect tribal interests. In contrast, when federal authority is delegated to a state, tribes are not always

n/a	National Tribal Water Council	Ken Norton (Chairman)
n/a	National Tribal Water Council	Ken Norton (Chairman)
n/a	National Tribal Water Council	Ken Norton (Chairman)

Partial Assumption	Application Process	Tribal Concerns with State Assumption of the CWA § 404 Program
Partial Assumption	Application Process	Tribal Concerns with State Assumption of the CWA § 404 Program
Partial Assumption	Application Process	Tribal Concerns with State Assumption of the CWA § 404 Program

n/a

(continued from above)

2.States are not required to comply with NHPA or ESA when issuing permits.

The consultation requirements of the National Historic Preservation Act (NHPA) and Endangered Species Act (ESA) are triggered by "federal action." If states take over the issuance of CWA § 404 permits, the federal action requirement is not triggered by the permit issuance itself. Yet the permitted discharges may nevertheless impact tribal waters, and tribal natural and cultural resources are still at risk of being degraded or destroyed. Recently EPA representatives assured the NTWC that EPA will continue to exercise its responsibilities under these statutes. The NTWC strongly supports this position. In fact, for example, on beds 3. The experience of tribes in Michigan illustrates problems that have arisen when a state assumes responsibility for the CWA § 404 program.

Michigan assumed responsibility for wetland dredge and fill permitting in 1984, the first of only two states to do so. A Memorandum of Agreement (MoA) between Michigan and EPA set out the responsibilities of the state and the federal government. The MoA was revised in 2011, and at that time language was inserted that the state would consult affected tribes as well as neighboring states when making CWA § 404 permitting decisions.

Michigan has had issues with the No Less Stringent requirement, due to providing various exemptions from wetland permitting (for example for agricultural uses, agricultural drains, and road maintenance) that were not allowed under the federal rules. A detailed timeline of the development of Michigan's program and its Most recently, State Rep. Tom Casperson introduced SB 1211 during the lame duck session of November 2018. If enacted it would gut wetlands protections by redefining what constitutes a protected wetland, excluding wetlands smaller than 10 acres and wetlands not adjacent to a navigable water. About half of the wetlands of Michigan, or about a half million acres, would suddenly not be protected if this bill becomes law. It seems certain that if this bill becomes law, that would be the "last straw" after more than 20 years of Michigan's noncompliance, and environmental organizations will petition EPA to withdraw Michigan's assumption of wetland regulation. The uncertainties created by Michigan's failure to comply with the law, its efforts to change the law outside of the regulatory process, and the likely ensuing litigation will only result in more delays for developers in the state.

n/a	National Tribal Water Council	Ken Norton (Chairman)

n/a	National Tribal Water Council	Ken Norton (Chairman)

Partial Assumption	Application Process	Tribal Concerns with State Assumption of the CWA § 404 Program

Partial Assumption	Application Process	Tribal Concerns with State Assumption of the CWA § 404 Program

(continued from above)

(continued from above)

To provide more detail from a tribal perspective on Michigan's assumption of the CWA § 404 program, the experiences of eight Michigan tribes with state wetland permitting actions were collected through phone or in-person interviews. Tribes in both peninsulas are represented in the stories collected. All respondents were interested in providing this information and willing to share their tribe's experiences. Some referred to others within the tribal government who knew more about the incident(s), but due to time limitations those others were not contacted.

Several recurring themes emerged. One recurring issue was surprising, and that is that Michigan routinely overstepped its authority by issuing permitting decisions on tribal trust lands and reservations. On these lands, state laws simply do not apply; rather, the Army Corps of Engineers (ACE) is the wetland dredge/fill permitting authority. Unfortunately, in some cases the tribal staff were unaware of this division in jurisdictional authority, and conceded to state permits because of the joint permitting process the Michigan Department of Environmental Quality (MDEQ) has in place with ACE.

The MDEQ/ACE joint permit process provides for a single application form for multiple purposes, including dredge/fill, installations of pilings, and similar activities. MDEQ and ACE share a single application and the attachments filed with it, and this procedure, when applied routinely and regularly for hundreds of applicants from across the state, creates a process flow routine that is difficult to modify for the few permit applications for which ACE retains authority, such as on tribal lands. Examples of the jurisdictional problem that has arisen, Other experiences included cases of MDEQ asserting authority over permitting in wetlands immediately adjacent to a Great Lake, which is also subject to ACE jurisdiction.

- A tribal fee land proposal to redevelop a fishing harbor faced a year's delay over MDEQ's asserted permitting of minor wetland fill (to slightly widen an access road) in coastal wetland adjacent to Lake Michigan.
- A proposal from a pipeline company to lay mats in a wetland adjacent to Lake Michigan to stage its geotechnical studies at the Straits, has been permitted by MDEQ.

Several tribes related numerous instances of MDEQ permitting wetland destruction in ceded territories without consideration of impacts on treaty-retained rights to hunt, fish, and gather in those areas. Wetlands are a significant ecotype with great importance for tribal lifeways, including being one of the most important sources for medicinal plants and the only source of wild rice. Destruction of wetlands within ceded territories harms tribes' access to these plants, is in violation of treaties with the United States, and is in essence a form of genocide. Treaty-retained rights are part and parcel of the treaty terms with the federal government, and state law does not supersede them.

Finally, tribes reported several instances when MDEQ wetland permitting processes prevented a tribe from carrying out important conservation initiatives.

- A wild rice lake in ceded territory had nontribal lakeshore residents wanting to treat wild rice with herbicides to remove an impediment to motor boating. The state approved this herbicide treatment. The tribe offered to relocate the wild rice to another appropriate waterway before the herbicide was applied, but the wetland permit process that MDEQ required of them was so onerous it introduced significant delays, and the herbicide treatment was carried out in the meantime. Wild rice is a culturally significant traditional and subsistence

n/a	National Tribal Water Council	Ken Norton (Chairman)
n/a	National Tribal Water Council	Ken Norton (Chairman)
Pyramid Lake Paiute Tribe	n/a	Vinton Hawley

Partial Assumption	Application Process	Other Issues for Consideration in Developing the CWA § 404 Program
Partial Assumption	Application Process	Other Issues for Consideration in Developing the CWA § 404 Program
General	Funding	n/a

n/a

NTWC Recommendations

n/a

1. Partial assumption of program.

The concept of allowing an assumption of authority for administering the program for certain waters may seem at first glance a reasonable means to reduce the burden on already stretched staff and financial resources in Indian country. The fact of the matter, however, is a tribe would still need to implement the entirety of the program. Therefore, this proposal probably would not significantly change the workload required to fulfill the requirements of assumption, but would reduce the number of waters for which tribes could issue permits. This outcome does not seem of any benefit to tribes.

In contrast, the NTWC is intrigued by the concept that Kathy Hurld (EPA, Office of Wetlands, Oceans and Watersheds) presented to the NTWC on October 24, 2018, which suggested that tribes might assume "certain activities" of the program, but for all tribal waters. This proposal might actually streamline the requirements of full assumption while allowing for more tribal oversight and input into the permitting process, and therefore we think that this concept merits consideration.

The tribes within Michigan's borders have had 34 years of experience with a state dredge and fill permitting authority, and this experience should be used to inform all assumptions of that permitting authority going forward. In light of lessons learned, as summarized above, whenever EPA develops MoAs with states in connection with assumption of the CWA § 404 program, each MoA should include specific terms that protect tribal interests, tribal jurisdiction and treaty and subsistence rights. In particular, the survey findings summarized in this letter lead us to make the following recommendations to EPA as it seeks to expand assumption of this authority to additional states:

•It is imperative that before any further approvals of state CWA § 404 programs are made, EPA and US ACE must clearly define the extent of the state's permit authority, including by specifying which wetlands are subject to a state permit when there is a coast, a navigable waterway used for interstate commerce, or similar waters subject to ACE jurisdiction.

•EPA must make clear to each state that its assumption of authority does not extend to Indian country. Tribes themselves, or the federal government by way of ACE, determine what activities may take place on trust or reservation lands or other areas of Indian country, and state laws do not apply there.

•"Joint" permitting processes such as the MDEQ/ACE process muddy the waters regarding proper jurisdiction. The officials involved become accustomed to their customary practices and neglect to adjust them for different circumstances. In future assumptions of authority, tribes strongly recommend against such joint permitting processes to avoid inappropriate treatment of tribal lands and waters.

•Future EPA/State MoAs should explicitly require consultation and coordination with Tribes in treaty-affected lands, not just adjacent to trust lands but throughout ceded territory where there are retained treaty and subsistence rights. Permit processes must explicitly consider impacts to treaty-protected resources. A treaty

1.) We're concerned that there wouldn't be funding available to implement a Tribal CWA 404 Program. States and tribes that have participated in the early development of the proposed regulation change have indicated that a state/tribal-authoritative CWA 404 Program would be expensive to develop and implement. The CWA §106 and §104{b)(c) funding alone will not be enough to fund implementation of such a program. This concern is compounded with the fact the nation's leaders have threatened to cut EPA funding and funding is becoming

Pyramid Lake Paiute Tribe	n/a	Vinton Hawley
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Red Cliff Band of Lake Superior Chippewa		Nathan Gordon (Vice Chairman)
Red Cliff Band of Lake Superior Chippewa	n/a	Nathan Gordon (Vice Chairman)

Enforcement & Compliance	Endangered Species Act	n/a
Enforcement & Compliance	WOTUS - Section 10	n/a
Enforcement & Compliance	Roles & Responsibilities	n/a
Enforcement & Compliance	Rulemaking Process	n/a
Enforcement & Compliance	Roles & Responsibilities	

n/a

n/a

n/a

2.) We are concerned that Pyramid Lake's threatened and endangered species, as well as cultural resources on ancestral lands, will not receive the same protection that they do under a Federal Program. Tribal nations have always been leaders in environmental protection and would continue being stewards of the land if granted CWA 404 Program authority. However, we are concerned that the same high standard of environmental may not be applied upstream in waters controlled by the state. Permit conditions are often what minimize the impact to the environment during dredging and filling activities. Federal standards for program governing need be incorporated into the proposal to ensure State and Tribal programs are implementing mitigation measures at the existing or higher standard. If permits are developed according to 3.) We're concerned with the potential lack of expertise in a state or tribal-run program. The current U.S. Army Corps of Engineer CWA 404 Program is a comprehensive program that requires extensive technical expertise, particularly in regards to the definition of Waters of the United States (WOTUS). State and Tribal- 4.) The oversight of the Army Core of Engineers in guiding permit actions is not clear in pre- proposal outline. In regulating all discharges of dredged or fill material into waters regulated by the Tribe under Section 404(g)-(1), the Tribe requests clarification be made in the proposal to describe the procedures to be conducted by State or Tribal program in permit conditions.

5.) Additionally the Tribe requests the proposal clarify how State programs will cooperate with Tribal programs when 404 permitting affects downstream water resources on Tribal lands. The governing of this program by the State of Nevada could potentially degrade our natural resources if economic development is held above The Red Cliff Band of Lake Superior Chippewa (Band) respectfully submits the following comments in regard to the rulemaking proposal for the CWA 404(g) State and Tribal Dredged and Fill Permit Program Regulatory Revision. The Band is a federally recognized tribe, with United States Environmental Protection Agency (EPA) recognized capacity and authority to implement provisions of the Clean Water Act (CWA), 33 U.S.C. §1313(c) and 1341. The Band currently executes CWA 106 and 319 programs throughout tribal lands within reservation boundaries and tribal waters. In addition to on-reservation resources, our inherent authority, as a sovereign nation , includes exercising treaty rights to hunt, fish, and gather within ceded territories reserved under treaties (1835 Treaty at Prairie du Chien , the 1837 Treaty at St. Peters, and the I 842 Miners Treaty and 1854 LaPointe Treaty on Madeline Island) signed with the United States government. The Band also retains and The goal of the CWA is to restore and maintain the chemic al, physic al, and biological integrity of the Nation's water. The Band understands that our wetlands and water resources are all connected, physically, chemically, biologically, and culturally. As stewards of these resources, Red Cliff staff participated in EPA webinars seeking input from tribes on revision of regulations related to State and Tribal assumption of CWA 404(g) held on November 20, 2018 and November 29, 2018.

The Band requests clarification on the following items:

- *The concept of "partial assumption" was mentioned as an option that does not currently exist, but that could be considered. What this would look like when implemented is unclear.*
- *CWA 106 and EPA Wetland Development grants were cited by EPA as a way to establish a programmatic framework. The Band ' s CWA I 06 funds are used for surface water monitoring and to maintain existing Water Program staff. In an assumption analysis provided by Fond du Lake Band of Lake Superior Chippewa, it was estimated that a portion (- 40-50%) of a full-time employee would be required to run a permitting program for their reservation. The Band's current CWA I 06 funding level already prevents implementation of a full-scale surface water program and simply cannot support additional costs that would be incurred by this*

Red Cliff Band of Lake Superior Chippewa	n/a	Nathan Gordon (Vice Chairman)

Enforcement & Compliance	WOTUS - Section 10	n/a

n/a

We support clarification of regulations that provide long term protection over wetlands and water resources. However, this decrease of federal CWA 404 (g) permitting, in conjunction with recent revisions that limit the scope of " Waters of the United States", raise concerns related to protection of wetlands and water resources upstream of our reservation and in our ceded territories. To do so would be perceived as a breach of the federal government's trust obligations. In addition, the Band requests further clarification on tribal